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IN THE

Supreme Court of the United States

No. 314

TRANS-LUX DISTRIBUTING CORP.,

Appellant,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL

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of Counsel.

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In the one-page argument of its motion to dismiss this appeal, appellee wholly ignores the substantial Federal questions presented in the jurisdictional statement and those underlying the holding of the intermediate appellate court and the opinion of the three-judge minority dissenting in the Court of Appeals. Not only does appellee's motion fail to come to grips with any of these issues, it also completely misstates the holdings of the majority of the Court of Appeals from which this appeal is taken and of the decisions of this Court to which appellee refers.

The motion to dismiss is apparently based on the contention, first, that the State Court of Appeals held the film "obscene" within the meaning of *Roth* v. *United States*, 354 U. S. 476 (1957) and, second, that its holding in this respect is so free of doubt that no substantial Federal question is presented. Both premises of appellee's argument are false.

First, as the jurisdictional statement demonstrates, the State Court of Appeals, construing the governing licensing statute of the State, expressly rejected the standards of obscenity articulated in *Roth* v. *United States, supra,* and the other decisions of this Court which followed *Roth.* The Court of Appeals held that denial of a license for exhibition of the motion picture here involved ("the Film") was warranted without regard to whether it was "obscene" under the governing decisions of this Court, stating, as follows:

> "* * * [B]ecause the material assigned as obscene in this case is not, in my view, speech, as opposed to conduct it need not come within the test laid down in *Roth* v. *United States* (354 U. S. 476, *supra*), that, in speech cases, obscenity must be the dominant theme of the work as a whole * * *." (Juris. Statement, Appendix A, p. 24).

Thus, contrary to appellee's contention, the New York Court of Appeals did not hold that the Film was obscene. On the other hand, the majority in the intermediate appellate court and the minority in the Court of Appeals, both regarding *Roth* as controlling, held that the Film was *not* "obscene" under those standards.

The second premise of appellee's motion is likewise false. Even had the State Court of Appeals construed the New York statute as embodying a standard synonymous with the *Roth* standard and held the film "obscene" under *Roth,* a substantial Federal question would plainly be presented. The intermediate appellate court and the three judges dissenting in the Court of Appeals concluded that the Film was not "obscene" under the *Roth* standard, and the cases cited in the jurisdictional statement, nowhere discussed nor distinguished in the motion to dismiss, fully support that conclusion. None of the cases cited by appellee suggests the contrary.

There is no basis at all for appellee to urge that the decisions of this Court, which consistently stress the neces-

sity of viewing a work as a whole and of limiting the application of obscenity laws to works "utterly without redeeming social importance," authorize the denial of a license to the Film solely because two scenes, viewed in isolation, are regarded as "obscene" (and even so holding by application of a standard far different from those articulated by this Court). Furthermore, as already indicated, the Court of Appeals itself did not attempt to justify the result on the ground that the Film was "obscene" under the standards of the cases decided by this Court.

Appellee repeatedly urges that the film portrays actual sexual intercourse and that solely by reason of this fact the film must be held "obscene". While there is no support for such a view of the governing law the fact is, as the intermediate appellate court held: "The sexual acts are implied rather than demonstrated" (Juris. Statement, Appendix B, p. 30).

Appellee's brief is also misleading in arguing that this film is a work designed to appeal to the "prurient" interest by sensationally portraying sexual intercourse. Rather than representing the exercise in "pornography" claimed by appellee, this film is a sensitive and thoughtful treatment of a relationship between a man and woman who are beset by problems of individual responsibility and morality which play a central role in contemporary thought. The film explores these problems in the context of this relationship and the interreaction of the two characters with each other.

Therefore appellee's argument that this film is so clearly "pornographic" as to preclude review by this Court is completely contradicted by the nature of the work itself as a serious treatment of problems of vital contemporary significance.

Beyond this, as the jurisdictional statement shows, the New York licensing statute, on its face and as here con-

strued and applied, constitutes an impermissible prior restraint of free expression, and application of the State statute is precluded here, as to an imported film, by section 305 of the Tariff Act of 1930, which prohibits the importation of "obscene" motion pictures.

This appeal presents substantial Federal questions. The Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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